United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-1381

To be argued by
MICHAEL D. ABZUG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1381

IN RE FRANCIS JOSEPH MILLOW,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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IN RE FRANCIS JOSEPH MILLOW,

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Preliminary Statement

Francis Joseph Millow appeals from an order committing him for civil contempt pursuant to Title 28, United States Code, Section 1826(a) and (b), entered on October 31, 1975, in the United States District Court for the Southern District of New York by the Honorable Lawrence W. Pierce, United States District Judge.

Statement of Facts

In March of 1975, Special Agent Lance Emory of the Federal Bureau of Investigation presented the results of two years of periodic physical surveillances and sixty days of electronic interception to the Organized Crime and Racketeering Section of the United States Department of Justice in Manhattan. The electronic surveillance had been conducted by members of the Westchester County District Attorney's office from November 8, 1974 to December 31, 1974 pursuant to the orders of Westchester County Court Judge Isaac Rubin. After reviewing the evidence furnished by Special Agent Emory, the Govern-

ment determined that it indicated probable violations of Title 18, United States Code, Sections 1955 and 371. Accordingly, a grand jury investigation was initiated on April 23, 1975.

On October 1, 1975, a grand jury subpoena was served on Millow, returnable on October 6, 1975.

Subsequently, Millow's October 6th grand jury appearance was rescheduled a number of times at his request until, on October 15, 1975, he filed a motion to quash his subpoena "on the grounds that the evidence sought was obtained by means of an illegal wiretap and also that [his] testimony would be unnecessary to a conviction." (Millow's Notice of Motion filed on October 15, 1975).

On October 28, 1975, Millow's attorney, Mark A. Varrichio, accepted service on his behalf of a grand jury subpoena returnable on October 29, 1975. Later that day, Millow's motion to quash was heard before the Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York. Mr. Varrichio stated that he believed that the federal grand jury investigation was utilizing evidence which was procured by the same court-authorized electronic surveillance which was used to file criminal charges against his client in Westchester County and that "[t]here never was a hearing at all conducted by me or anyone that I know of to test the validity of the order which authorized the wiretapping." (Transcript of October 28, 1975 at 3). Mr. Varrichio concluded that before his client testified, the Government had the burden of coming forward in a hearing "to show that the order to obtain this evidence [before the grand jury] by means of the wiretap [was] valid . . ." (Transcript of October 28, 1975 at 4). Though Mr. Varrichio was unable to cite any authority to support his position that his client was entitled to a plenary hearing, he gave

the following argument to persuade the Court that unlawful evidence might be used by the grand jury to question Mr. Millow:

> "There has been extensive use of wiretaps and wiretap orders, et cetera, involving this particular investigation and I have gone into it to some extent in Westchester County and the cases pending up there, I happen to have two of them, and I am not all satisfied in my own mind that the information which led to any wiretap was obtained by legal means. I understand that there are affidavits that have been submitted by federal agents and state agent, et cetera, but I do not know where and when the investigation started, how it was commenced or things of that nature.
>
> Now, I am sure that this investigation had to start somewhere with someone and until that information is furnished to this court or some other court, I do not see how anyone can possibly determine whether or not any information obtained as a result of this information has been legally obtained. (Transcript of the October 28, 1975 at 8-9).

The Court reviewed the orders, affidavits, and applications which authorized the electronic surveillance conducted by members of the Westchester County District Attorney's office from November 8, 1974 to December 31, 1974 and found them to be facially sufficient. Accordingly, it denied Millow's motion to quash his subpoena.

On October 29, 1975, Millow appeared before the Grand Jury and was advised that the questions which would be posed to him would be based on electronic surveillance, testimony from other grand jury witnesses, statements which he made to Justice Department officials and physical surveillance of his movements during the past

two years. Millow then refused to answer a number of questions on the basis of his Fifth Amendment privilege against self-incrimination. Following this assertion, Millow was shown an Order signed by the Honorable John M. Cannella, United States District Judge for the Southern District of New York, on October 10, 1975, which granted him immunity pursuant to Title 18, United States Code, Section 6002. After Millow indicated that on the basis of his discussions with his attorney he understood the effect of the order, he was questioned again about whether he knew certain individuals. Notwithstanding the foreman's direction to answer the questions, Millow again refused to respond on the ground of his intention to file an appeal from the Court's ruling on October 28, 1975.

On October 31, 1975, the Government moved for an Order, pursuant to Title 18, United States Code, Section 1826(a) and (b), to remand Millow to the custody of the United States Marshal until such time as he was willing to testify before the Grand Jury or until the expiration of the term of the Grand Jury on April 16, 1977. During the hearing on the Government's motion, Millow's attorney alleged that "basically, in substance and effect," the Government had advised Mr. Millow in the grand jury that he had been the subject of "telephonic eavesdropping . . . for a year and a half to two years." (Transcript of October 31, 1975 at 6). The Government attorney who made the alleged "concession" in the grand jury offered the minutes of the proceeding for the Court's inspection made the following representation:

> I think Mr. Millow misunderstood what I was advising him. I merely advised him that his physical movements had been under surveillance, not that his phone had been tapped as apparently he told his defense attorney[,] for two years. That is not

> the case, your Honor. I am familiar with all aspects of this investigation, your Honor. There is no electronic surveillance that has been placed on either a premises controlled by Mr. Millow or a telephone which is registered to Mr. Millow or which Mr. Millow used other than the ones that have been placed before your Honor. That is the only electronic surveillance that I am aware of in this case, and since I am the attorney who is going to be propounding these questions, your Honor, before the grand jury, I believe that that's dispositive. (Transcript of October 31, 1975 at 9)

The Government also indicated in an affidavit filed with the Court on October 30, 1975 that the grand jury investigation "was initiated as a result of electronic surveillance conducted by members of the Westchester County District Attorney's office from November 7, 1974 to December 31, 1974 pursuant to the orders of Westchester County Court Judge Isaac Rubin."

Following argument on the motion, Judge Pierce made the following findings of fact:

> On October 28, 1975, Mr. Millow's attorney, Mr. Varrichio, brought on before me a motion seeking to quash a grand jury subpoena on the ground that the testimony of Mr. Millow was unnecessary and that the electronic surveillance underlying the investigation, the existence of which was explicitly admitted by the government, was illegal. Counsel for the witness cited no specific provision of law which he claimed had not been complied with in obtaining the electronic surveillance nor was there cited any persuasive authority in support of the proposition that the burden was on the government to prove that all of the provisions of the law have been complied with in what it appears would amount to a full suppression hearing.

> I reviewed the applications, the affidavits and orders underlying the electronic surveillance in this case and found them to be legally sufficient on their face. I therefore deny the motion to quash the subpoena and direct the witness, through Mr. Varrichio, to answer the grand jury's inquiry.
>
> The witness, according to the minutes of the grand jury proceedings dated October 29, 1975, apparently . . . has received a grant of immunity so that there does not appear to be any Fifth Amendment privilege issue, and then on October 29, 1975, the witness again refused to testify after consultation with Mr. Varrichio, after having been advised by Mr. Abzug that he had immunity and that if he refused to testify he could be held in contempt, and he refused to testify after being directed by the foreman of the grand jury to testify. The witness apparently indicated that he would not testify because he intended to appeal the October 28, 1975, order of this Court. Mr. Abzug then indicated to Mr. Millow that on behalf of the government, the grand jury, Mr. Abzug would move to have Mr. Millow held in civil contempt pursuant to 28 United States Code, Section 1826(a), and to have him remanded immediately into custody pursuant to 28 United States Code, Section 1826(b). (Transcript of October 31, 1975 at 16-17)

The Court then addressed Millow to satisfy itself that he had and would refuse to testify before the grand jury notwithstanding Judge Cannella's order granting him immunity. (Transcript of October 31, 1975) After Millow told the Court that he would not testify before the Grand Jury, Judge Pierce, in reliance upon this Circuit's opinion is *In re Persico*, 491 F.2d 1156 (2d Cir. 1974) and the

Government's representation that the only electronic surveillance which would be utilized to question Mr. Millow had been disclosed to the Court, ordered him to be confined at the Manhattan Correctional Center until he was willing to testify or until the expiration of the term of the grand jury, whichever first occurred. The Court further ordered that the appellant would be confined without bail since his appeal was "frivolous and presented no novel or significant question of law." (Transcript of October 31, 1975 at 23)

Millow then filed a notice of appeal in which he raised the following issues: "(1) Whether or not a witness must testify before a grand jury after having been granted 'use immunity', if he has raised the issue of an illegal wiretap order and having introduced evidence of a specific instance of the probability of said illegality, until the government actually demonstrates that the wiretap order is in fact legal *after a plenary hearing;* (2) whether the Court abused its discretion in not setting bail after the above ruling." (Millow's Notice of Appeal filed October 31, 1975; emphasis in the original).

On November 13, 1975, this Court denied Millow's motion for bail pending argument on the merits, which was scheduled for the week of December 1, 1975.

ARGUMENT

There is no merit to Millow's claim that his refusal to answer questions before the grand jury was proper on account of the absence of a showing by the Government that the questions were not based on illegal electronic surveillance.

On appeal, Millow claims that Judge Pierce's order committing him for civil contempt should be vacated because (1) the prosecutor admitted, in addressing him before the Grand Jury on October 29, 1975, that the questions put to him were based on "two years of electronic surveillance", rather than the sixty days authorized by the orders of Westchester County Court, and accordingly were tainted by such illegal electronic surveillance; and (2) that the prosecutor's denial of a purported claim below by Millow was insufficient under Title 18, United States Code, Section 3504 because the prosecutor was "not the official who procured the court order of November 8, 1974 [from the Westchester County Court], nor did he conduct the investigation". (Brief at 5, 7). Neither of these contentions has any merit.

As to the first claim, it is perfectly apparent that the prosecutor did not concede or even imply in the Grand Jury on October 29 that Millow had been the subject of unlawful electronic surveillance for two years. The passage of the Grand Jury minutes relied on, set forth in Millow's brief at page 5, is a statement by the prosecutor that the questions to be put "were based on electronic surveillance, physical surveillance of your movements in the past two years by the Federal Bureau of Investigation and local law-enforcement officials, witnesses before this Grand Jury. . . ." This is not, and cannot properly be said to be, a statement that Millow had been under electronic surveillance—necessarily illegal beyond the sixty days au-

thorized by the Westchester County Court—for two years; the "two years" clearly refers to the physical surveillance. Any misapprehension Millow might have had on this score was cleared up at the October 31 contempt proceedings before the order of civil contempt was made. (Transcript of October 31, 1973 at 8-10).*

Millow's other contention is that the Government's denial of illegal electronic surveillance below after a claim was raised under Section 3504 of Title 18 was inadequate because the prosecutor did not purport to include denials on behalf of the Federal Bureau of Investigation and the Westchester County District Attorney's Office and did not make the "eight agency search" referred to in Judge Oakes' dissenting opinion in *United States* v. *Grusse*, 515 F.2d 1157, 159, 160 (2d Cir. 1975). This contention is without merit for several reasons.

Section 3504 requires the Government to "affirm or deny the occurrence of the alleged unlawful act" when there has been "a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act"; an "unlawful act" within the meaning of Section 3504, despite the apparent syntactical error in Section 3504 (b), means "the use of any elec-

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* Millow goes on to claim that if this Court should disagree with his interpretation of the comment by the prosecutor before the Grand Jury, "then a plenary suppression hearing should be held to determine the legality". (Brief at 5) The "legality" referred to is presumably of the orders of the Westchester County Court, which was determined by Judge Pierce at the October 28 hearing on Millow's motion to quash precisely as required by this Court's opinion *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974). Millow, who, unlike the appellant in *Persico*, had copies of the wiretap orders and supporting documents at the time of the October 28 hearing, has yet to offer a suggestion why Judge Pierce's conclusion that the orders were valid is wrong or why he should have the plenary hearing *Persico* forecloses.

tronic, mechanical or other device (as defined in Section 2510(5) of Title 18, United States Code) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto". H.R. Rep. 91-1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code, Cong. and Ad. News 4007, 4026-4028. Here, except for a claim conjured up solely from an egregious misinterpretation of the prosecutor's remarks before the Grand Jury, discussed *supra*, there was no claim by Millow under Section 3504 or even a "mere assertion that unlawful wiretapping has been used against a party", *United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974), citing *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

Proceedings in the District Court were brought on by Millow's motion to quash his subpoena, based on his affidavit that he should not be summoned merely "to tie a few loose ends together" and that he had learned from the prosecutor "that most of this investigation and the information obtained during it had been obtained by the extensive use of intercepted telephone conversations. My attorney has informed me that I have the right to object to the use of intercepted telephone communications, prior to testifying before the Grand Jury". (Affidavit of Joseph Millow, dated October 15, 1975). At the hearing before Judge Pierce on October 28 on his motion to quash, Millow's attorney made clear that his motion was directed to validity of the wiretap, already familiar to him from earlier State court proceedings involving Millow, authorized by the Westchester County Court in November, 1974. The wiretap applications and orders and supporting affidavits were reviewed by Judge Pierce and found sufficient. While Millow's attorney added that "I am not at all satisfied in my own mind that the information which led to any wiretap was obtained by legal means . . . I do not know where and when the investigation started,

how it was commenced or things of that nature", it seems clear that this was neither a "claim" or illegal electronic surveillance apart from the Westchester County Court orders nor one that could be properly entertained. *United States* v. *Calandra*, 414 U.S. 338 (1974). Similarly, the further hearing then sought by Millow about the underpinnings of the wiretap order was exactly what *In re Persico, supra*, intended to preclude.

Before the Grand Jury the next day, Millow's refusal to answer was based, not on a claim of illegal electronic surveillance, but on his asserted desire to appeal Judge Pierce's refusal to quash his subpoena, which, of course, was not appealable. *See United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974).

At the contempt proceeding brought on by the Government's application under 28 U.S.C. § 1826 on October 31, Millow did present an affidavit, sworn to October 31, 1975, claiming a concession of illegal electronic surveillance by the prosecutor before the Grand Jury, discussed *supra*. The contention in the affidavit was further amplified by counsel's argument at the contempt proceeding that the prosecutor's "concession" established "what we suspected to be true, that there had been prior eavesdropping on Joseph Millow and the probability is that there has been an illegal wiretap of his phone." (Transcript of October 31, 1975 at 6-7). The prosecutor answered, accurately, that he had made no such concession before the Grand Jury and that he knew of no electronic surveillance in the case other than that authorized by the Westchester County Court and the subject of the hearing three days before.

Thus the claim of illegal electronic surveillance—apart from the Westchester County Court wiretap orders, properly sustained below by Judge Pierce, whose determina-

tion is not attacked here—was based solely on Millow's plain misconstruction of what the prosecutor said before the Grand Jury. That Millow has wrongly interpreted what the prosecutor said has already been shown. The remaining question is whether a claim under Section 3504 on such an inadequate basis triggers any obligation on the Government's part beyond pointing out the basic inadequacy of the factual premise underlying the claim, and, if so, whether that additional obligation was met here.

This Court has, to our knowledge, never determined whether the basis for a claim of illegal electronic surveillance may be plumbed before the Government's duty to affirm or deny arises under Section 3504(a). The question appears to have been avoided in *In re Buscaglia*, 518 F.2d 77, 78 (2d Cir. 1975), where the "only ground alleged . . . was the refusal of the attorney for the Strike Force either to affirm or deny that such eavesdropping . . . existed". The *Buscaglia* court, 518 F.2d at 78, did cite *United States* v. *Alter*, 482 F.2d 1016, 1026-1027 (9th Cir. 1973), with apparent approval as a case "where the court spelled out the prima facie elements of the affidavits required to trigger the government's duty of disclosure", but the requirements in *Alter*, as the Ninth Circuit subsequently made clear, *United States* v. *Vielguth*, 502 F.2d 1257 (9th Cir. 1974), were limited to a claim of illegal electronic surveillance of the witness' *attorney*. On the other hand, the citation by this Court in *United States* v. *Toscanino*, *supra*, 500 F.2d at 281, of the District of Columbia Circuit's decision in *In re Evans*, *supra*, 452 F.2d at 1247, for the proposition that the Government's duty to respond under Section 3504 is triggered by a "mere assertion" of unlawful electronic surveillance, must be read in the light of Toscanino's detailed factual averments in affidavit form that there had been illegal wiretapping of his conversations in Uruguay at the behest of the United States Government. *Id.* at 270-271. Thus the

showing required before a witness is entitled to a response from the Government under Section 3504 appears to be an open question in this Circuit.

For purposes of this case, we suggest that the Court need not answer the question finally and completely. It is enough here that the sole basis for Millow's belated claim here was his contorted reading of a statement by the prosecutor in the Grand Jury, a statement which offers no support whatever for the claim Millow has raised and which is conclusively refuted by the Grand Jury minutes themselves. We respectfully submit that too often a claim of illegal electronic surveillance by a Grand Jury witness is merely a device to obstruct the Grand Jury investigation and to attempt to justify a refusal to testify the true basis of which has no relationship to any claimed illegal electronic surveillance. Where, as here, the record is crystal clear that the factual basis for the claim of such surveillance is entirely without substance, then the claim should be rejected without the need for a response by the Government under Section 3504 and the burdens which attend insuring its accuracy. *Cf. Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974).

Even if, however, a "mere assertion" of illegal electronic surveillance, without any factual basis, is sufficient to trigger a response from the Government under Section 3504, we respectfully submit that the prosecutor's response at the October 31 hearing to Millow's last-minute claim was sufficient. Not only did the prosecutor deny the factual basis for Millow's assertion of illegal electronic surveillance, the want of merit of which was made clear enough by the Grand Jury minutes, he also made clear that to his knowledge there was no electronic surveillance whatsoever in the investigation besides that ordered by the Westchester County Court and already passed upon by Judge Pierce three days earlier. (Transcript of October 31, 1975 at

9) The adequacy of the Government's response under Section 3504 to a claim of illegal electronic surveillance should turn on the degree of substance facially supporting such a claim, *United States* v. *See*, 505 F.2d 845, 855-856 & n. 18 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974), and we respectfully submit that, given the basis for the claim made by Millow below, the prosecutor's oral representation to the District Court was sufficient, *United States* v. *Stevens*, 510 F.2d 1101 (5th Cir. 1975);* *Matter of Berry*, 521 F.2d 179, 184-185 (10th Cir. 1975). *See also In re Grand Jury Proceedings*, 522 F.2d 196 (5th Cir. 1975). Such a conclusion is particularly appropriate here, since it is an unsworn oral statement of the prosecutor which is the sole basis for the claim now raised by Millow.**

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* *Stevens* is particularly instructive in this case since its facts parallel remarkably the proceedings below.

** This view is not inconsistent with Judge Lumbard's concurring opinion in *United States* v. *Grusse*, *supra*, 515 F.2d at 158-159, which, given the reliance upon it in *In re Buscaglia*, *supra*, 518 F.2d at 79, may fairly be said to state the law in this Circuit. In that case Judge Lumbard found sufficient the sworn affidavit and testimony of the Assistant United States Attorney in charge of the Grand Jury investigation that neither he nor the FBI agent in charge of the case could discover any illegal electronic surveillance of the witnesses before the Grand Jury. While the prosecutor's response below was neither sworn nor as complete, the adequacy of that response under *Grusse* must be measured by the substantiality of the claims raised by the witness. *United States* v. *See*, *supra*. Judge Newman's unreported opinion in the District Court in *Grusse* discloses that the claims of unlawful electronic surveillance rested on a considerably more substantial basis than Millow's:

> "The witnesses contend initially that they and their attorneys have been subjected to illegal electronic surveillance, that the Grand Jury questioning is or may be derived therefrom, and that such occurrences are a defense to contempt citations for failure to testify. *Gelbard* v. *United States*, 408 U.S. 41 (1972). In support of this claim, there have been submitted affidavits by the witnesses and their attorneys (and other attorneys who, though they

[Footnote continued on following page]

Finally, to put an end to the matter, the Government will file in this Court, prior to or at oral argument, affidavits denying illegal electronic surveillance from the prosecutor in charge of the Grand Jury investigation, the FBI agent conducting the investigation by that agency, and the Assistant District Attorney for Westchester County who secured the wiretap orders from the Westchester County Court, as well as a letter from the appropriate official of the United States Department of Justice in Washington, disclosing that an agency search has been conducted and has uncovered no electronic surveillance of Millow except that already disclosed. *In re Buscaglia*, *supra*, 518 F.2d at 79; *In re Grumbles*, 453 F.2d 119 (3d Cir. 1971); *United States* v. *Doe*, 451 F.2d 466 (1st Cir. 1971).*

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have not appeared for the witnesses, are alleged to be cooperating attorneys with the attorneys who have appeared). These affidavits allege that the witnesses and attorneys believe they have been subjected to illegal electronic surveillance, *i.e.*, wiretapping. The claims are based on conclusory statements that the questions asked must have come from such surveillance, as well as more particularized claims to telephone malfunctioning and unusual sounds heard on telephones. No expert testimony was presented linking the telephone sounds or malfunctioning to a likelihood of wiretapping".

(Opinion of the District Court, filed February 19, 1975, as reproduced in Appellant's Appendix in *United States* v. *Grusse*, Dkt. No. 75-2029 (2d Cir.) at A-16, A-17-A-18).

* No additional response is necessary to Millow's request for bail pending *certiorari* if this Court affirms the order below.

CONCLUSION

The order below should be affirmed.

Respectfully submitted,

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MICHAEL D. ABZUG,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John D. Gordan, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 1st day of December, 1975, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Mark A. Varrichio, Esq.
3071 Westchester Avenue
Bronx, New York 10461

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at ~~the United States Courthouse, Foley Square,~~ Borough of Manhattan, City of New York.
1 St. Andrew's Plaza,

John D. Gordan III

Sworn to before me this

1st day of December 1975.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977